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International Law Situations

With Solutions and Notes

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SITUATION IV.

DELIVERY OF CONTRABAND AT SEA.

(It is granted in this situation that the Declaration of London is binding.)

There is war between the United States and State X. Great Britain is neutral. A British vessel, having on board articles of the nature of absolute contraband and bound for a port of State X, is met at sea by a United States cruiser. It is evident from the date of sailing and from the vessel's papers that she did not know of the outbreak of hostilities. The commander of the cruiser is remote from a prize court and does not wish to take the merchant vessel in. He requests her master to deliver the contraband. The master declines.

What should the commander of the cruiser do?

SOLUTION.

In absence of exceptional necessity, and if the contraband is not voluntarily delivered, the commander of the cruiser should either send to a prize court or else release the neutral vessel.

NOTES.

Treaty provisions on delivery of contraband.—One of the earliest treaties providing for the delivery of contraband by a neutral master to a visiting belligerent is that of February 7/17, 1667/8, between Great Britain and the States-General of the United Netherlands.

XIV. If it should happen that any of the said French captains should make prize of a vessel laden with contraband goods, as hath been said, the said captains may not open nor break up the chests, mails, packs, bags, cask, or sell, or exchange, or otherwise alienate them, until they have landed them in the presence of the judges or officers of the Admiralty, and after an inventory by them made of the said goods found in the said vessels; unless the contraband goods making but a part of the lading, the master of the ship should be content to deliver the said contraband goods

unto the said captain, and to pursue his voyage; in which case the said master shall by no means be hindered from continuing his course and the design of his voyage. (1 Chalmers Collection of Treaties, vol. 1, p. 167.)

The treaty with France of February 4, 1676-77, Article VII, stated:

If the vessel is laden but in part with contraband goods, and the master thereof offers to put them in the captor's hands, the captor shall not then oblige him to go into any port, but shall suffer him to continue his voyage.

The words "agree, consent, and offer to deliver them to the captor" is the form used in some of the later treaties.

Similar provision appears in treaties between European States during the late seventeenth and during the eighteenth centuries. Article 26 of the treaty of Utrecht between Great Britain and France, 1713, is an example of the prevalence of this form of international agreement.

A provision in regard to the delivery of contraband by a neutral vessel in the treaty of 1782 between Russia and Denmark reads:

ART. XX. Que si par contre un navire visité se trouvoit surpris en contrebande, l'on ne pourra point pour cela rompre les caisses, coffres, balles & tonneaux qui se trouveront sur le même navire, ni détourner la moindre partie des marchandises; mais le capteur sera en droit d'amener le dit navire dans un port, où après l'instruction du procès faite par devant les juges de l'amirauté selon les règles & loix établies, & après que la sentence définitive aura été portée, la marchandise non-permise, ou reconnue pour contrebande, sera confisquée, tandis que les autres effets & marchandises, s'il s'en trouvoit sur le même navire, seront rendus, sans que l'on puisse jamais retenir ni vaisseau, ni effets, sous prétexte de frais ou d'amende. Pendant la durée du procès le Capitaine, après avoir délivré la marchandise reconnue pour contrebande, ne sera point obligé malgré lui, d'attendre la fin de son affaire; mais il pourra se mettre en mer avec son vaisseau & le reste de sa cargaison, quand bon lui semblera, & au cas qu'un navire marchand de l'une des deux Puissances en paix fût saisi en pleine mer, par un vaisseau de guerre, ou armateur, de celle qui est en guerre, & qu'il se trouvât chargé d'une marchandise reconnue pour contrebande, il sera libre au dit navire marchand, s'il le juge à propos, d'abandonner d'abord la dite contrebande à son capteur, lequel devra se contenter de cet abandon volontaire, sans pouvoir retenir, molester ou inquiéter en aucune façon le

navire, ni l'équipage, qui pourra dès ce moment poursuivre sa route en toute liberté. (De Martens, Recueil des Principaux Traités d'Alliance, etc., Tome II, 1779-1786, inclusive, p. 292.)

Russia also made similar treaties with Austria in 1873; with France in 1787; with the Two Sicilies and with Portugal in the same year; and with Sweden in 1801. Other European powers have made a few such agreements.

Orders to commanders and domestic regulations of much earlier date than 1782 allow a form of surrender of contraband by neutral masters and its acceptance by belligerent commanders.

Treaties of the United States.—The United States early made treaty agreements in regard to the handing over of contraband by a neutral vessel. One of the earliest of such treaties was negotiated with Sweden in 1783 and is still in force. The "certificates" mentioned in the treaty are ships' papers which contain—

a particular account of the cargo, the place from which the vessel sailed, and that of her destination . . . which certificates shall be made out by the officers of the place from which the vessel shall depart.

Article 13 of the treaty with Sweden referring to the handing over of contraband is as follows:

If on producing the said certificates it be discovered that the vessel carries some of the goods which are declared to be prohibited or contraband and which are consigned to an enemy's port, it shall not, however, be lawful to break up the hatches of such ships nor to open any chest, coffers, packs, casks, or vessels, nor to remove or displace the smallest part of the merchandises until the cargo has been landed in the presence of officers appointed for the purpose and until an inventory thereof has been taken; nor shall it be lawful to sell, exchange, or alienate the cargo or any part thereof until legal process shall have been had against the prohibited merchandises, and sentence shall have passed declaring them liable to confiscation, saving, nevertheless, as well the ships themselves as the other merchandises which shall have been found therein, which by virtue of this present treaty are to be esteemed free, and which are not to be detained on pretense of their having been loaded with prohibited merchandise and much less confiscated as lawful prize. And in case the contraband merchandise be only a part of the cargo, and the master of the vessel agrees, consents, and offers to deliver them to

the vessel that has discovered them, in that case the latter, after receiving the merchandises which are good prize, shall immediately let the vessel go and shall not by any means hinder her from pursuing her voyage to the place of her destination. When a vessel is taken and brought into any of the ports of the contracting parties, if upon examination she be found to be loaded only with merchandises declared to be free, the owner, or he who has made the prize, shall be bound to pay all costs and damages to the master of the vessel unjustly detained. (Treaties and Conventions, 1776-1909, vol. 2, p. 1729.)

The treaty of the United States with Prussia of 1799, which is regarded as still operative, has a provision relating to the delivery of contraband, but the wording is somewhat different from that of the Swedish treaty. Article XIII of the Prussian treaty reads:

And in the same case of one of the contracting parties being engaged in war with any other Power, to prevent all the difficulties and misunderstandings that usually arise respecting merchandise of contraband, such as arms, ammunition, and military stores of every kind, no such articles, carried in the vessels, or by the subjects or citizens of either party, to the enemies of the other, shall be deemed contraband so as to induce confiscation or condemnation and a loss of property to individuals. Nevertheless it shall be lawful to stop such vessels and articles, and to detain them for such length of time as the captors may think necessary to prevent the inconvenience or damage that might ensue from their proceeding, paying, however, a reasonable compensation for the loss such arrest shall occasion to the proprietors, and it shall further be allowed to use in the service of the captors, the whole or any part of the military stores so detained, paying the owners the full value of the same, to be ascertained by the current price at the place of its destination. But in the case supposed of a vessel stopped for articles of contraband, if the master of the vessel stopped will deliver out the goods supposed to be of contraband nature he shall be admitted to do it, and the vessel shall not in that case be carried into any port, nor further detained, but shall be allowed to proceed on her voyage.

All cannons, mortars, firearms, pistols, bombs, grenades, bullets, balls, muskets, flints, matches, powder, saltpeter, sulphur, cuirasses, pikes, swords, belts, cartouch boxes, saddles and bridles, beyond the quantity necessary for the use of the ship, or beyond that which every man serving on board the vessel, or passenger, ought to have, and, in general, whatever is comprised under the denomination of arms and military stores, or what description so ever, shall be deemed objects of contraband. (Ibid., p. 1491.)

The treaty of 1828 between the United States and Brazil has a somewhat different statement from that of earlier treaties.

ART. 18. The articles of contraband, before enumerated and classified, which may be found in a vessel bound for an enemy's port, shall be subject to detention and confiscation, leaving free the rest of the cargo and the ship, that the owners may dispose of them as they see proper. No vessel of either of the two nations shall be detained on the high seas on account of having on board articles of contraband, whenever the master, captain, or supercargo of said vessels will deliver up the articles of contraband to the captor, unless the quantity of such articles be so great and of so large a bulk that they can not be received on board the capturing ship without great inconvenience; but in this and all the other cases of just detention the vessel detained shall be sent to the nearest convenient and safe port, for trial and judgment, according to law. (*Ibid.*, vol. 1, p. 139.)

Article 19 of the treaty of 1846 between the United States and Colombia (*ibid.*, p. 308) is identical with article 18 of the Brazilian treaty above mentioned.

The same may be said of Article 19 of the Bolivian treaty of 1858. (*Ibid.*, p. 119.)

The treaty between the United States and Haiti of 1864, terminated in 1905, provided for the acceptance of the evidence of certificates and for delivery of contraband under certain restrictions.

ART. 23. To avoid all kind of vexation and abuse in the examination of the papers relating to the ownership of the vessels belonging to the citizens of the contracting parties, it is hereby agreed that when one party shall be engaged in war and the other party shall be neutral the vessels of the neutral party shall be furnished with passports, that it may appear thereby that they really belong to citizens of the neutral party. These passports shall be valid for any number of voyages, but shall be renewed every year.

If the vessels are laden, in addition to the passports above named, they shall be provided with certificates, in due form, made out by the officers of the place whence they sailed, so that it may be known whether they carry any contraband goods. And if it shall not appear from the said certificates that there are contraband goods on board, the vessels shall be permitted to proceed on their voyage. If it shall appear from the certificates that there are contraband goods on board any such vessel, and the

commander of the same shall offer to deliver them up, that offer shall be accepted, and a receipt for the same shall be given, and the vessel shall be at liberty to pursue her voyage unless the quantity of contraband goods be greater than can be conveniently received on board the ship of war or privateer, in which case, as in all other cases of just detention, the vessel shall be carried to the nearest safe and convenient port for the delivery of the same.

In case any vessel shall not be furnished with such passport or certificates as are above required for the same, such case may be examined by a proper judge or tribunal; and if it shall appear from other documents or proofs, admissible by the usage of nations, that the vessel belongs to citizens or subjects of the neutral party, it shall not be confiscated, but shall be released with her cargo (contraband goods excepted) and be permitted to proceed on her voyage. (*Ibid.*, p. 927.)

The United States has had similar provisions in treaties with France, 1800; with Central America, 1825; with Mexico, 1831; with Venezuela, 1836; with Peru, 1836; with Ecuador, 1839; and with San Salvador, 1850.

A late treaty containing a provision in regard to delivery of contraband was that of March 9, 1874, between the Argentine Republic and Peru:

XXIII. No vessel of either of the contracting parties shall be detained on the high seas for having articles of contraband on board, provided always the captain or supercargo of the said vessel deliver the articles of contraband to the captor, unless these articles should be numerous or of such great bulk that they can not, without serious inconvenience, be received on board the captor's vessel; but in this and all the other cases of just detention the vessel detained shall be sent to the nearest convenient and secure port, to be there judged agreeably with the laws. (*British and Foreign State Papers*, vol. 69, p. 706.)

British rule.—The British Manual of Naval Prize Law of 1866 provided:

186. The commander will not be justified in taking out of a vessel any contraband goods he may have found on board, and then allowing the vessel to proceed; his duty is to detain the vessel, and send her in for adjudication, together with the contraband goods on board.

This clause appears in the manual prepared by Prof. Holland and issued by authority of the Lords Commissioners of the Admiralty in 1888 as No. 81.

American Navy Department order, 1898.—General Order 492 of the Navy Department of June 20, 1898, says:

The title to property seized as prize changes only by the decision rendered by the prize court. But if the vessel itself, or its cargo, is needed for immediate public use, it may be converted to such use, a careful inventory and appraisal being made by impartial persons and certified to the prize court.

Opinions of text writers.—There is much to be said against the practice by which officers whose functions are primarily executive are intrusted with functions which are in a measure judicial. In general, contraband should pass before a prize court. It is for the naval officer to make the capture, but for the court to determine its propriety and disposition.

Kleen says of confiscation without adjudication by a prize court:

Il n'est guère besoin de relever combien cet usage est peu compatible avec un bon règlement des prises. Sans doute, tout propriétaire particulier est libre de livrer, s'il le veut, sa propriété, même légale, à un belligérant ou à ses organes militaires, en supportant volontairement la perte; et s'il le fait, soit par crainte, indifférence ou insouciance, personne n'a qualité pour s'en plaindre. Mais une renonciation semblable à la protection de la loi ne saurait dans aucune hypothèse lui être imposée comme *devoir*. Aucun patron d'un navire neutre n'a le droit de livrer ainsi la propriété de son armateur sans le consentement de celui-ci, en s'autorisant d'un usage inique; et aucun croiseur n'a le droit de s'en emparer sans procédure qui prouve sa propre compétence et l'illégalité de l'objet. D'autre part, le propriétaire peut s'en rapporter au droit international pour protester contre toute confiscation qui se fait sans jugement régulier. Quant aux frais et aux retards qu'occasionnent les formalités juridiques, ils seront à la charge du contrevenant qui en est la cause, à savoir du neutre qui aurait rompu sa neutralité, ou bien du capteur qui aurait effectué une saisie injuste ou légère.

Afin de régler ces questions à l'amiable, plusieurs États ont conclu, surtout vers la fin du XVIII^e siècle, des traités par lesquels les contractants se sont mutuellement concédé le droit de confisquer, en cas de guerre, la contrebande sur simple délivraison, sans procédure. Il est évident que ces actes conventionnels sont autant de preuves que la confiscation purement exécutive manque de fondement dans le droit international, puisqu' autrement il eût été superflu de s'en réserver le droit par traité spécial. Un

tel traité est naturellement valide, mais il ne lie que ses parties. Un État qui ne s'est pas ainsi obligé, n'a pas besoin de tolérer que des confiscations non judiciaires aient lieu sous son pavillon par des belligérants. (La Neutralité, vol. 1, p. 450.)

Dana, in a note to Wheaton, states his opinion as follows:

Taking contraband goods out of neutral vessels.—It is for the interest of the neutral carrier, if he knows that the goods claimed by the visiting cruiser are contraband, to give them up and be permitted to go on his way, rather than to be carried into the belligerent's port to await adjudication upon them. In the seventeenth article of the treaty of 1800 between the United States and France, which expired in 1808, there is a provision that if the vessel boarded shall have contraband goods and shall be willing to surrender them to the cruiser she shall be permitted to pursue her voyage, unless the cruiser is unable to take them on board, in which case the vessel shall accompany her to port. This stipulation is common in the treaties between the United States and the other American Republics. Hautefeuille contends for this as a right of a neutral by international law; by which, however, he means that it should be the neutral's right, by justice and reason, in the author's opinion. No national act in diplomacy, or based on adjudication, and independent of treaty, has been produced or suggested by the distinguished author in affirmation of such a right. It is to be observed that as the captor must still take the cargo into port and submit it to adjudication, and as the neutral carrier can not bind the owner of the supposed contraband cargo not to claim it in court, the captor is entitled, for his protection, to the usual evidence of the ship's papers, and whatever other evidence induced him to make the capture, as well as to the examination on oath of the master and supercargo of the vessel. It may not be possible or convenient to detach all these papers and deliver them to the captor, and certainly the testimony of the persons on board can not be taken at sea in the manner required by law. Such a provision may be applicable to a case where the owner of the goods, or a person capable of binding him, is on board and assents to the arrangement, agreeing not to claim the goods in court, but not to a case where the owner is not bound. There may also be a doubt whether the ostensible owner or agent is really such, and so the captor may be misled. Indeed, a strong argument might be made from these considerations that the article in the treaty can only be applied to a case where there is the capacity in the neutral vessel to insure the captor against a claim on the goods. (Wheaton, International Law, Dana ed., p. 665*n*.)

Naval Conference of 1908-9.—The Austro-Hungarian proposition before the International Naval Conference in 1908 was as follows:

On pourrait déclarer, par exemple, d'une part, qu'il sera loisible au capitaine du navire neutre de livrer sur-le-champ la contrebande ou de la détruire, si, par là, il peut échapper à la saisie et, par conséquent, à la destruction de son bâtiment, d'autre part, que le capteur sera obligé de prendre possession des marchandises ou d'en permettre la destruction si, en laissant le navire neutre continuer sa route avec la contrebande à bord, il compromettrait sa propre sécurité ou le succès de ses opérations.

De pareils préceptes pourraient être, de même, établis quant aux matières du droit de prise.

Il est clair que la formule n'en pourrait être trouvée que lorsqu'un accord se sera produit sur les principes du régime, auquel les prises neutres devront être soumises. (British Parliamentary Papers, Miscellaneous, No. 5. International Naval Conference, 1909, p. 100.)

Report of British Delegation.—The report of the British Delegation to Sir Edward Gray:

18. Careful consideration was given to the question, raised in paragraph 33 of our instructions, whether any satisfactory arrangement could be devised for allowing the immediate removal by the captor of any contraband found on board a neutral vessel. Proposals were put forward by several delegations. The most far-reaching one was one submitted by Austria-Hungary, under which the neutral vessel carrying contraband was to be given the right to proceed on her way without further molestation if the master was ready to hand over the contraband to the captor on the spot, a proviso being added which made it necessary that the subsequent decision of a prize court should intervene in order either to validate the transaction or to decree compensation where the captor should have been proved to have acted wrongfully. In this form, the proposal did not meet with general support. It was objected that to concede an absolute right in the terms to the neutral would constitute an unjustifiable interference with the legitimate rights of belligerents, and that, moreover, the rule would be found in practice unworkable. The Conference therefore fell back upon the clause now embodied in the Declaration as article 44, which goes no further than authorizing the handing over of contraband, or its destruction, on the spot, by common agreement between captor and neutral, subject to the subsequent reference of the case to the prize court. It is not anticipated that it will be possible to apply this rule in very numerous instances,

as, under modern conditions of maritime commerce, the transshipment or destruction of cargo on the high seas is likely in most cases to present serious or insuperable difficulties. But, so far as it goes, the rule may afford a welcome measure of relief in favorable circumstances. (Parliamentary Papers, Miscellaneous, No. 4, 1909, International Naval Conference, p. 97.)

Application of Declaration of London.—The fact that the British merchant vessel did not know of the outbreak of hostilities is covered by Article 43 of the Declaration of London:

ART. 43. If a vessel is met with at sea unaware of a state of war, or of a declaration of contraband affecting her cargo, the contraband is not to be condemned, except on payment of compensation; the vessel herself and the remainder of the cargo are exempt from condemnation and from the payment of the expenses referred to in Article 41. The same rule applies if the master, after becoming aware of the opening of hostilities or of the declaration of contraband, has not yet been able to discharge the contraband.

The General Report, London Naval Conference, in reference to this article, states:

This provision has for its aim to protect neutrals who might, in fact, be carrying contraband, but against whom no charge could be made, which may happen in two cases. The first is that in which they do not know of the opening of hostilities; the second is that in which, though they know of this, they do not know of the declaration of the contraband a belligerent has made, in accordance with articles 23 and 25, and which is properly applicable to the whole or a part of the cargo. It would be unjust to capture the ship and condemn the contraband; on the other hand, the cruiser can not be bound to permit to go on to the enemy goods suitable for use in the war and of which he may be in urgent need. These opposing interests are reconciled in the sense that the condemnation may take place only in payment of compensation. (See for a similar idea the convention of the 18th of October, 1907, in the rules for enemy merchant vessels in the outbreak of hostilities.)

The procedure, as outlined by the Declaration of London, 1909, Article 54, would apply only in case of exceptional necessity. This article says:

The captor has the right to require the delivery, or to proceed himself to the destruction of, goods liable to condemnation found on board a vessel not herself liable to condemnation, provided that

the circumstances are such as would, under article 49, justify the destruction of a vessel liable to condemnation. The captor must enter in the log book of the vessel stopped the articles handed over or destroyed, and, must procure from the master duly certified copies of all relevant papers. When the delivery, or the destruction, has been effected, and the formalities complied with, the master must be allowed to continue his voyage.

The provisions of articles 51 and 52, respecting the obligations of a captor who has destroyed a neutral vessel, are applicable.

The General Report of the Conference further explains Article 54:

A cruiser encounters a neutral merchant vessel carrying contraband in a proportion less than that specified in article 40. The captain of the cruiser may put a prize crew on board the vessel and take her into a port for adjudication. He may, in conformity with the provisions of article 44, accept the delivery of the contraband which is offered to him by the vessel stopped. But what is to happen if neither of these solutions are reached? The vessel stopped does not offer to deliver the contraband and the cruiser is not in a position to take the vessel into one of her ports. Is the cruiser obliged to let the neutral vessel go with the contraband on board? This has seemed excessive, at least in certain exceptional circumstances. These are in fact the same which would have justified the destruction of the vessel if she had been liable to condemnation. In such a case the cruiser may require the delivery or proceed to the destruction of the goods liable to condemnation. The reasons which warrant the destruction of the vessel would justify the destruction of the contraband goods, the more so is the considerations of humanity which may be invoked in case of a vessel do not here apply. Against an arbitrary demand by the cruiser there are the same guaranties as those which made it possible to recognize the right to destroy the vessel. The captor must, as a condition precedent, prove that he really found himself in the exceptional circumstances specified; failing this, he is penalized to the value of the goods delivered or destroyed, instant investigation as to whether they were or were not contraband.

Résumé.—The goods upon the neutral British vessel are of the nature of absolute contraband.

The vessel is evidently ignorant of the existence of hostilities. The contraband could not be condemned except with the payment of indemnity. There is no doubt that the articles of the nature of absolute contraband could be condemned on payment of indemnity.

In accordance with Article 54 of the Declaration of London, the captor has a right to require the giving up of such goods—

provided that the circumstances are such as would, under Article 49, justify the destruction of a vessel liable to condemnation—

That is, if the observance of the rule requiring that—captured neutral vessels should be sent to a prize court for adjudication, * * * would involve danger to the ship of war or to the success of the operations in which she is at the time engaged.

The simple wish of the commander not to send such a vessel to a prize court when the vessel is innocent and when the cargo has become contraband without the knowledge of the master of the vessel would not be sufficient ground for requiring the giving up of the goods or for proceeding to the destruction of the goods.

The simple fact of remoteness from the prize court may make it inconvenient, expensive, or inexpedient to send the British vessel in, but such grounds are not sufficient to justify the use of force against a neutral vessel.

In such circumstances, if the master prefers the delay and the adjudication of the prize court to the delivery of the goods to the commander of the cruiser, he is free to make such a decision and to decline to deliver the goods. The commander of the cruiser would, under such conditions, be obliged to decide whether to send in or to release the neutral vessel.

SOLUTION.

In absence of exceptional necessity, and if the contraband is not voluntarily delivered, the commander of the cruiser should either send to a prize court or else release the neutral vessel.